Supreme Court, U.S.
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No. 92-1692

In The

Supreme Court of the United States

October Term, 1992

CITY OF ELY, CONSERVATIONISTS WITH COMMON SENSE, INC.; F.B. HUBACHEK, JR.; WILDERNESS OUTFITTERS, INC.,

Petitioners,

v.

FRIENDS OF THE BOUNDARY WATERS WILDERNESS: SIERRA CLUB; THE WILDERNESS SOCIETY; DEFENDERS OF WILDLIFE: WILDERNESS WATCH; WILDERNESS INQUIRY; MINNESOTA PUBLIC INTEREST RESEARCH GROUP; IZAAK WALTON LEAGUE OF AMERICA, INC.,

Private Respondents,

and

F. DALE ROBERTSON, CHIEF OF THE UNITED STATES FOREST SERVICE; MIKE ESPY, SECRETARY OF AGRICULTURE,

Federal Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONERS, WILDERNESS OUTFITTERS, INC. and F.B. HUBACHEK, JR., TO PRIVATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PREFACE

The fact that the government has not sought review of the Circuit Court's decision (Private Respondents' brief, p.4) is irrelevant to the issue of certiorari. Presumably, these Petitioners (Intervenors) are entitled to as much consideration as the government which must determine whether or not to petition for certiorari in literally hundreds of cases.

Private Respondents state (p.4) that the portages are now closed to motorized use. Despite the Private Respondents' strenuous efforts to have the portages torn up so even portage wheel use would have been impossible, these Petitioners believe that a Native American family of Ely may have continuing rights of motorized use of the Four-Mile Portage by deed and that a scientific research foundation also has such rights until 1995. These deed rights are of public record.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING "FEASIBLE" TO MEAN "PHYSICALLY POSSIBLE" (OP. 7,8)

Neither *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) nor *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981) supports the Court of Appeals' cramped definition of "feasible." This Court has never held that "feasible" means possible as a matter of law with no room for administrative construction. The Court of Appeals' decision not only holds that

"feasible" means "possible", but that the ability of strong rangers to accomplish a non-motorized portage is sufficient to satisfy the BWCAW Act. It may be *possible* to push a boat with a 25 hp motor across the Grand Portage from Lake Superior to the border lakes, some 25 miles, as this portage was done by the voyageurs with large canoes and heavy packs of furs and supplies. It is, however, scarcely feasible as that term is commonly understood.[1] Private Respondents refer to "a quality of absurdity" (fn.2,p.5) to the contention that portage wheels are not a feasible means of portaging heavy motorboards for up to four miles. The administrative findings and video-taped results are to the contrary. Indeed, what is absurd is the Private Respondents' assertion that Congress intended to permit motors on the lakes on each end of these portages, but to deny them as a matter of law on the portages.

A glaring error of the majority opinion of the Circuit is its reliance on selected portions of the legislative history. The intent of Congress as a whole is ignored and the statement of one Representative who was opposed to motorized use is substituted. If Congress had intended to terminate these portages, as Congressman Burton indicated, it would have done so directly and not left the

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[1] In Footnote 1, pp. 3-4, Private Respondents state that "Petitioners identify no relevant case of this Court ignored by the Eighth Circuit and identify no contrary Eighth Circuit precedent, as there are none." Petitioners submit that the Eighth Circuit decision is contrary to *Chevron*, misapplies *Overton Park*, and is also contrary to *Voyageurs Region National Park Association v. Lujan*, 966 F.2d 424 (8th Cir. 1992), holding that general provisions of the Wilderness Act must give way to the more specific provisions of the statute. 966 F.2d at 428.

determination to the Secretary. If the Congress meant "possible", it would have used that word, not "feasible."

II. THE ISSUE IS OF IMPORTANCE NOT ONLY TO PROSPECTIVE USERS OF THE AREA, BUT ALSO IN ADMINISTRATIVE DETERMINATION OF QUESTIONS PURSUANT TO *CHEVRON*

These three portages are used by 13,000 visitors annually and thousands more are prospective users. The majority of these people, those not in the 90th percentile of physical fitness including almost all elderly and handicapped people, will be forever barred from enjoying this prime wilderness and fishing area. Thousands more resort owners and merchants in and around Ely, Minnesota, will suffer financially from the closing of this small portion of the wilderness yet available for public motorboat use.

Private Respondents attempt (p.4) to denigrate the importance of this case by referring to the Act "regulating three small pieces of land in one northern Minnesota wilderness" which they assert will never again require judicial attention. The Private Respondents are special interest groups who have a personal desire to enjoy Basswood and Trout Lakes (as well as the thousands of other lakes in the wilderness area) with canoes only, despite the fact that Congress has specifically authorized the use of motorboats on these two lakes. The interest of these Private Respondents should not be construed to be environmental.

However, there is a greater importance to the case than that involving the use of these three portages. The

Court of Appeals effectually avoided the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) by its finding. If this case is permitted to stand, it will permit result-oriented courts to avoid the finding of an administrative agency mandated by Congress and supported by substantial evidence.

In addition, as Congressman Oberstar pointed out in his *amicus curiae* brief, there are some 1,200 statutes which use the term "feasible" and thus defining "feasible" as meaning "possible" in all circumstances has far reaching consequences.

CONCLUSION

The Private Respondents' assertion (p.7) that the Eighth Circuit "took the only available course" is clearly erroneous in view of the dissent of Judge Magill and the decision of the District Court. Two out of the four Judges who have written opinions on this question have adopted the position of the Petitioners (Intervenors), which is a compelling reason why this Court should accept jurisdiction.

May 1993

Respectfully submitted,

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